STATE OF MICHIGAN

COURT OF APPEALS

DAVID YOUNG,

Plaintiff-Appellant,

v

DELCOR ASSOCIATES, INC., d/b/a DELCOR HOMES,

Defendant-Appellee,

and

DELCOR HOMES-HOMETOWN VILLAGE OF ANN ARBOR, LTD.,

Defendant-Third Party Plaintiff,

and

MICHIGAN WALL PANEL, INC.,

Third Party Defendant-Appellee.

UNPUBLISHED
June 27, 2006

No. 266491
Washtenaw Circuit Court
LC No. 02-000798-NI

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of his premises liability and contractor liability claims against Delcor Homes-HVA pursuant to MCR 2.116(C)(10) on the grounds that the allegedly dangerous condition was open and obvious and was not located in a common work area. We affirm in part, and reverse in part. Plaintiff also appeals the summary dismissal of his contractor liability claim against Michigan Wall Panel pursuant to MCR 2.116(C)(10) on the ground that Michigan Wall Panel did not act as a general contractor on the construction site. We affirm.

On March 19, 2002, plaintiff was an employee of RPA Construction, Inc., which had contracted with Michigan Wall Panel to provide rough carpentry labor on a house that Delcor Homes-HVA was building. On that date, plaintiff was on the second floor of the home installing an overhang. His coworker, Timothy Hadley, was also on the second floor covering

prefabricated walls with Tyvek. At some point Hadley laid a wall panel down over about one-third of the second floor stairwell opening when he went to retrieve some Tyvek and plaintiff stepped on that wall panel while attempting to retrieve some staples. Plaintiff knew that there was a stairwell opening under the wall but he thought the wall panel was a solid section. In fact, the wall was in two sections, joined together at a joint. So, when plaintiff stepped on the wall panel, the joint separated and he fell through both the second floor and first floor stairwell openings, over twenty feet to the basement. Neither stairwell opening was covered or barricaded.

Thereafter, plaintiff filed his complaint asserting premises liability and contractor liability claims against both Delcor defendants, the purported owners of the premises and general contractors at the construction site. Delcor Homes-HVA filed a third-party complaint for indemnification against Michigan Wall Panel alleging that, pursuant to their contract, Michigan Wall Panel was responsible for supervising the installation of the wall panels, thus, any negligence was chargeable to it. Plaintiff then amended his complaint to add Michigan Wall Panel as a defendant, asserting the same premises liability and contractor liability claims, but adding Michigan Wall Panel in the alternative.

Defendant Delcor Associates answered plaintiff's complaint, denying that it owned, possessed, or controlled the premises where plaintiff was injured. Defendant Delcor Homes-HVA answered plaintiff's complaint, admitting that it owned the premises and was the general contractor for the overall construction, but further averring that it contracted with Michigan Wall Panel to provide rough framing work and Michigan Wall Panel assumed possession and control of plaintiff's work site, as well as legal responsibility with regard to the safety of that site. Defendant Michigan Wall Panel then filed a third-party complaint against RPA Construction, alleging that RPA Construction agreed to indemnify Michigan Wall Panel for liability arising out of their contract.

Defendant Michigan Wall Panel then moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that its only responsibilities with respect to the project were to provide prefabricated walls and to hire out the rough construction of the home, and these responsibilities were fulfilled when it provided the materials and hired RPA Construction to perform the labor. Michigan Wall Panel argued that it was undisputed that it was not the owner and did not possess or control the project site; thus, it could not be liable under premises or contractor liability theories. And, although Michigan Wall Panel agreed to indemnify Delcor, it did so only with respect to Michigan Wall Panel's own negligent acts, i.e., "Trade Partner's indemnification hereunder will only be for losses or injuries due in whole or in part to Trade Partner's acts or omissions or the acts or omissions of parties whom Trade Partner has employed or for whose acts Trade Partner is liable." Therefore, Michigan Wall Panel argued, it was entitled to the grant of summary disposition with prejudice as to Delcor Homes-HVA's and plaintiff's claims.

In its supplemental brief, Michigan Wall Panel reiterated that it "was simply a subcontractor hired to supply the material to rough in the home and to provide the labor to install the prefabricated materials." It further argued that a Delcor employee testified that he was the job supervisor, plaintiff testified that Michigan Wall Panel was only at the site to deliver materials, and an employee of Michigan Wall Panel confirmed that all it did was inspect the work performed by RPA Construction to determine that it was done correctly and in conformity

with Delcors' standards. Thus, the evidence illustrated that Michigan Wall Panel did not supervise the work.

Defendants Delcor jointly responded to Michigan Wall Panel's motion for dismissal, arguing that under the plain terms of their agreement, Michigan Wall Panel had a duty to indemnify the Delcor defendants if Michigan Wall Panel is found negligent, if those whom Michigan Wall Panel employed were negligent, and if Michigan Wall Panel is found to be vicariously liable, i.e., liable for the negligence of another.[1] Because plaintiff alleged that Michigan Wall Panel and RPA Construction were negligent, Michigan Wall Panel had a contractual duty to indemnify the Delcor defendants for any liability arising out of their negligence. Further, the Delcor defendants moved for summary disposition of their third-party complaint pursuant to MCR 2.116(I)(2). Plaintiff also responded to Michigan Wall Panel's motion for dismissal, arguing that genuine issues of material fact existed as to the issues (1) whether Michigan Wall Panel had possession and control over the premises as provided by its contract with Delcor Homes-HVA, (2) whether the danger was open and obvious or presented a special aspect because the opening created an unreasonable risk of severe harm, and (3) whether Michigan Wall Panel was a general contractor at the site because it had control over the job site.

Subsequently, RPA Construction filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no express contractual indemnity to support Michigan Wall Panel's third-party complaint against it and any claim of implied contractual indemnity against it, as plaintiff's employer, was barred as a matter of law. RPA Construction argued that there was, in fact, no written contract between it and Michigan Wall Panel related to the construction at the site where plaintiff's injuries occurred, known as Lot 71.

Michigan Wall Panel responded to RPA Construction's motion for summary disposition, arguing that a written contract existed between Michigan Wall Panel and RPA Construction with respect to Lot 21, another site involved in the project, and that another contract existed with respect to Lot 71 that was valid, albeit not signed. Michigan Wall Panel further argued that RPA Construction was equitably estopped from denying the existence of a contract, as well as the express indemnity clause included in the contract, because it was led to believe that RPA Construction was performing its work pursuant to the terms of the virtually identical contract entered into with respect to Lot 21.

Then the Delcor defendants filed a joint motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that (1) although Delcor Homes-HVA owned the premises, it did not possess and control it at the time of the incident, (2) even if Delcor Homes-HVA did possess and control the premises, the defect was open and obvious without special aspects, (3) the inherently dangerous work activity exception did not apply because it is inapplicable to an employee of an independent contractor, (4) plaintiff could not establish the elements of the common work area doctrine, and (5) plaintiff could not establish that it retained control of the premises. Thus, defendants Delcor argued, they were entitled to judgment as a matter of law.

[1] Delcor Homes-HVA also responded by filing a motion to amend its third-party complaint to add a breach of contract claim against Michigan Wall Panel based on Michigan Wall Panel's assertion that it was only obligated to deliver materials to the job site, contrary to its express contractual obligations which included overseeing safety. The motion was granted.

Plaintiff responded to the Delcor defendants' motion for summary dismissal, arguing that there were genuine issues of material fact as to whether Delcor Homes-HVA had possession and control over the premises as evidenced by the fact that its agent, Joel Finnell, was the admitted on-site supervisor with duties that included directing and inspecting the work of subcontractors. Plaintiff also argued that the Delcor defendants had actual notice of the stairwell openings and that there was a genuine issue of material fact as to whether they were open and obvious. But, even if the danger was open and obvious, special aspects existed because the risk of falling over twenty feet through the unguarded opening was unreasonably dangerous. Plaintiff also argued that there were questions of fact as to whether he was in a common work area when he was injured and whether the property owner retained control over the work site. Thus, plaintiff argued, the Delcor defendants were not entitled to the grant of summary disposition.

On December 8, 2004, the trial court heard oral arguments on the several motions for summary disposition, and took most under advisement. On December 23, 2004, the trial court granted RPA Construction's motion for summary disposition as to Michigan Wall Panel's third-party complaint "for the reasons stated on the record, which appear to be that no express contractual indemnity existed between the parties." On January 13, 2005, the trial court entered an order (1) granting Michigan Wall Panel's motion for summary disposition as to plaintiff's complaint, apparently on the ground that plaintiff failed to establish that Michigan Wall Panel was anything other than a subcontractor, contrary to the terms of a contract between it and Delcor Homes-HVA; and (2) taking Michigan Wall Panel's motion for dismissal as to Delcor Homes-HVA's claim for indemnification under advisement.

Thereafter, Michigan Wall Panel filed a supplemental brief in support of its motion for summary disposition of Delcor Homes-HVA's indemnification and breach of contract claims, arguing that (1) the ostensible agreement only required Michigan Wall Panel to indemnify Delcor Homes-HVA for its own negligence and since the trial court found that Michigan Wall Panel did not owe plaintiff a duty, it cannot be negligent, and (2) Delcor Homes-HVA's common law duties as premises owner and/or general contractor were not delegable, even if plaintiff could establish that Delcor failed to supervise and provide a safe work environment in a common work area that it retained control over. Thus, Michigan Wall Panel argued, it was entitled to summary disposition of these claims.

On March 11, 2005, the trial court entered an order denying Michigan Wall Panel's motion for summary disposition as to Delcor Homes-HVA's claim, and granting Delcors' motion for summary disposition as to plaintiff's claims. In a lengthy opinion, the trial court held that Delcor Homes-HVA was the holder of legal title to the subject property and evidence established that it acted as general contractor of the project, thus, Delcor Associates was entitled to summary disposition as to plaintiff's claims. With respect to plaintiff's claims against Delcor Homes-HVA, as the premises owner and general contractor, the trial court held that plaintiff established a genuine issue of material fact as to whether Delcor Homes-HVA, through its site supervisor, Joel Finnell, had possession and control of the premises at the time of plaintiff's injuries—a necessary element of both claims.

But, the trial court concluded that plaintiff's premises liability claim against Delcor Homes-HVA failed as a matter of law because the allegedly dangerous condition—either the opening itself or the opening partially covered by the wall panel—was (a) open and obvious, or (b) presented an unexpected hazard for which Delcor Homes-HVA did not have notice as even

plaintiff did not realize that the wall panel would not support his weight. Further, the trial court held, there was nothing about the opening that constituted a special aspect because its presence, and the associated twenty foot drop, was expected in the context of a construction project. And, the trial court concluded that plaintiff's premises liability claim grounded on the retained control theory failed for the same reason plaintiff's contractor liability claim failed—plaintiff did not pass the common work area test. Specifically, he did not create a genuine issue of material fact that he was injured in a common work area because the evidence illustrated that "the project site had been occupied for several days at least by only RPA employees." And, plaintiff failed to satisfy another element of the test because "the existence of the stairwell openings in the first and second floors of the house did not create 'a high degree of risk to a significant number of workers' any more than the dangerous condition alleged in *Ormsby* [*v Capital Welding, Inc*, 471 Mich 45, 60 n 12; 684 NW2d 320 (2004)]." The trial court also rejected plaintiff's inherently dangerous activity claim because that "exception is not available to employees of independent contractors . . . ." Accordingly, the trial court granted the Delcor defendants' motion for summary disposition with regard to all of plaintiff's claims.

With respect to Michigan Wall Panel's motion for summary disposition as to Delcor Homes-HVA's indemnification claim, the trial court held that the plain language of the contract entered into by the parties provided that Michigan Wall Panel would indemnify Delcor Homes-HVA for any liability arising out of RPA Construction's negligence. The contract provided that "Trade Partner's indemnification hereunder will only be for losses or injuries due in whole or in part to Trade Partner's acts or omissions *or the acts or omissions of parties whom Trade Partner has employed* or for whose acts Trade Partner is liable." Here, because Michigan Wall Panel hired, i.e., employed, RPA Construction, Michigan Wall Panel must indemnify Delcor Homes-HVA for liability arising out of RPA Construction's negligence. Accordingly, Michigan Wall Panel's motion for summary dismissal was denied, as was its motion for reconsideration, and Delcor Homes-HVA's motion for summary disposition pursuant to MCR 2.116(I)(2) was granted. Thereafter, plaintiff filed a motion to sever his summarily dismissed action from Delcor Homes-HVA's claim for indemnification against Michigan Wall Panel, which was granted.[2] This appeal followed.

Plaintiff first argues that his premises liability claim against Delcor Homes-HVA should not have been dismissed because (a) "the trial court erred in determining that the hazard on the premises which injured [plaintiff] was a combination of the wall board comprised of two pieces and the floor opening, and not the floor opening itself," (b) but even if that was the hazard, its hidden nature did not relieve Delcor Homes-HVA of its duty to protect plaintiff, an invitee, and (c) because the danger of an over twenty foot drop posed an unreasonably high likelihood of severe harm, i.e., a special aspect, Delcor Homes-HVA was not relieved of its duty to protect plaintiff from the condition. After review de novo, considering the record evidence in a light most favorable to plaintiff to determine whether a genuine issue of material fact exists, we agree. See MCR 2.116(C)(10); *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004); *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

[2] Subsequently, a stipulation for dismissal of Delcor Homes-HVA's third-party complaint against Michigan Wall Panel was entered.

First, plaintiff claims that the trial court improperly considered the dangerous condition as consisting of the stairwell opening partially covered by the jointed wall panel. But, that is not solely what the trial court decided. Rather, the trial court considered both conditions—the stairwell opening and the stairwell opening partially covered by the wall panel that had a joint that was not visible upon casual inspection. The trial court concluded that, if the alleged hazard was merely the opening, it was open and obvious. Even plaintiff admitted that he knew it was there. But, the court reasoned, plaintiff did not just accidentally fall into the opening, he purposely walked over the opening, relying on a wall panel partially covering it to support his weight. And, the court noted, the evidence indicated that this was a common practice but usually the wall panels did support the weight of the workers. Thus, the trial court concluded, the wall panel unexpectedly failing under the weight of a worker was not an open and obvious hazard to plaintiff or other workers and, in fact, was so obscure that Delcor Homes-HVA had no reason to know of the hazard or protect plaintiff from it. We disagree with the trial court's open and obvious analysis and holding.

Generally, a premises possessor owes an invitee a duty to exercise reasonable care to protect the invitee from an unreasonable risk of harm on the property. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). But,

> where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. [*Id*., quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992).]

That is, "a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Lugo*, *supra* at 517.

Here, plaintiff claims that the stairwell sans stairs was the dangerous condition because if he had just walked on a wall panel that was not lying over that opening, and the panel gave way under his weight, he would not have fallen over twenty feet to the basement floor, i.e., no injury would have occurred. The trial court rejected that argument on the ground that, but for plaintiff walking on the wall panel and the wall panel separating under his weight, the open stairwell would not have been a factor contributing to his injuries. Thus, it seems that the trial court's decision involved a proximate cause determination. It is apparent to us that both of these factors—the open, unbarricaded stairwell and the jointed wall panel lying over it—operated concurrently to cause plaintiff's harm; there was more than one proximate cause of plaintiff's injuries. See *Brisboy v Fibreboard Corp*, 429 Mich 540, 547; 418 NW2d 650 (1988).

But, the allegedly dangerous condition for which plaintiff was attempting to hold Delcor Homes-HVA liable for as the premises possessor, was the stairwell sans stairs. That is the allegedly unreasonable risk of harm that Delcor Homes-HVA should have known existed on its property, not the jointed wall panel that plaintiff's coworker placed partially over the opening just before plaintiff fell. And, we agree with the trial court that the open, unbarricaded stairwell was an open and obvious condition. An ordinary person of average intelligence would be expected to observe it upon casual inspection. See *Novotney v Burger King Corp (On Remand)*,

198 Mich App 470, 475; 499 NW2d 379 (1993). However, the issue is whether there is evidence that creates a genuine issue of material fact that Delcor Homes-HVA should have anticipated harm despite plaintiff's knowledge of the stairwell sans stairs, i.e., if special aspects of the condition made the open and obvious risk unreasonably dangerous. We conclude that Delcor Homes-HVA should have anticipated such harm; there were special aspects of the stairwell that gave rise to "a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." See *Lugo*, *supra* at 518-519.

The evidence indicates that plaintiff was working on the second floor of the house performing rough carpentry work. The stairwells on the first and second floors did not have stairs, were not covered, and were unbarricaded. There was an over twenty foot drop to the basement of the house from the second floor. This is not a case involving a common pothole or ordinary steps. Similarly, plaintiff is not the atypical person who would suffer an unusually grievous injury from confronting this risk, and he was not engaged in unforeseeable conduct or involved in highly unique circumstances. See *id*. at 519 n 2. Rather, this is a case involving an unusual open and obvious condition that was unreasonably dangerous because it presented "an extremely high risk of severe harm to an invitee who fails to avoid the risk in circumstances where there is no sensible reason for such an inordinate risk of severe harm to be presented." See *id*.

Contrary to the trial court's conclusion, that plaintiff was a subcontractor on a construction site does not vitiate Delcor Homes-HVA's duties.[3] The duty owed by the premises owner is owed to all invitees. As our Supreme Court held in *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 329 n 10; 683 NW2d 573 (2004), an open and obvious determination is "not dependent on the characteristics of a particular plaintiff, but rather on the characteristics of a reasonably prudent person." And, the "focus [is] on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff." *Lugo*, *supra* at 524. In this case, anyone who was in that house was at substantial risk of accidentally falling through the stairwell, several feet to the basement floor, and suffering potentially grave injuries. That is, the character, location, and surrounding conditions of the stairwell were such that, despite its open and obvious nature, Delcor Homes-HVA had a duty to undertake reasonable precautions to protect invitees from that risk. See *Perkoviq v Delcor Homes-Lake Shore Pointe, Ltd*, 466 Mich 11, 17-18; 643 NW2d 212 (2002), quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

[3] We note that if the trial court's conclusion was correct, a construction worker injured on a job site by an unreasonably dangerous open and obvious condition would have no tort remedy unless injured in a common work area. This position is contrary to the policy behind the law of torts which seeks to "encourage implementation of reasonable safeguards against risks of injury," as well as compensate victims of such injuries. See *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), rev'd on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982). And, this conclusion would also dampen the incentive of a general contractor or premises owner, who retains control of the construction project, to diligently maintain workplace safety. See, e.g., *Ghaffari v Turner Constr Co*, 473 Mich 16, 27; 699 NW2d 687 (2005).

More specifically, the stairwell was located in a home that was under construction, it extended from the second floor to the basement—a distance of about 25 to 28 feet, it measured about 3½ feet wide and over 7 foot long, it did not have stairs, and was neither covered nor barricaded. Moreover, this stairwell did not exist in a typical circumstance but at a construction site. In *Ghaffari v Turner Constr Co*, 473 Mich 16; 699 NW2d 687 (2005), our Supreme Court aptly described the environment at a construction site as follows:

> The hazards existing at construction sites are numerous and may typically come from any one of three dimensions, including from above. These hazards may often be in motion. Loud and sudden noises may surround and distract the construction worker, with many of these noises emanating from the dangerous activities carried out by fellow workers who may be near. Nonetheless, at the same time that he or she is confronted with such an environment, the construction worker must move at a business-like pace in order to carry out his or her job—one that may require considerable physical exertion, and require attention to detail and compliance with demanding professional standards—in a timely manner. This is in contrast to the typical premises liability case in which the open and obvious hazard is found on or near ground level, and in which distractions, although they may sometimes exist, are of a considerable less urgent and persistent character than those faced by the construction worker. While the construction worker still bears the responsibility of carrying out his or her work in a reasonable and prudent manner, the worker will typically encounter more dangers of a more diverse character, and more distractions coming from more directions, than will persons shopping in retail establishments or walking in parking lots or visiting the residences of others, and will generally be less able to avoid a given hazard than the typical invitee or licensee, even if the hazard may be seen after the fact as open and obvious. [*Id*. at 28-29.]

In sum, the evidence, considered in a light most favorable to plaintiff, created a genuine issue of material fact regarding whether there were special aspects of the stairwell that gave rise to a uniquely high likelihood of harm or severity of harm if confronted and, therefore, Delcor Homes-HVA had a duty to undertake reasonable precautions to protect invitees, like plaintiff, from that risk. See *Lugo*, *supra* at 517. Although plaintiff fell after stepping on a jointed wall panel partially covering the stairwell, such circumstance does not detract from the stairwell's dangerous nature. See *id*. at 524.[4] There is no sensible reason that such risk, which could have been easily eliminated by barricading or covering the stairwells, was allowed to persist. See *id*. at 519 n 2. Therefore, we conclude that the trial court erred in summarily dismissing this premises liability claim.

Next, plaintiff argues that his contractor liability claim against Delcor Homes-HVA should not have been dismissed because a genuine issue of material fact exists as to whether several other workmen were exposed to the same high degree of risk that caused plaintiff's

[4] "[A]ny comparative negligence by an invitee is irrelevant to whether a premises possessor has breached its duty to that invitee in connection with an open and obvious danger because an invitee's comparative negligence can only serve to reduce, not eliminate, the extent of liability." *Lugo, supra* at 524.

injury in a common work area. After review de novo, considering the record evidence in a light most favorable to plaintiff to determine whether a genuine issue of material fact exists, we disagree. See MCR 2.116(C)(10); *Corley*, *supra*; *West*, *supra*.

At common law, property owners and general contractors generally could not be held liable for the negligence of independent contractors and their employees. But, in *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974)[5], our Supreme Court created an exception to the rule—the common work area doctrine. To establish a viable claim under this doctrine, the plaintiff must show that "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54; 684 NW2d 320 (2004). "It is not necessary that other subcontractors be working on the same site at the same time; the common work area rule merely requires that employees of two or more subcontractors eventually work in the area." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997).

In dismissing plaintiff's contractor liability claim, the trial court held that plaintiff did not create a genuine issue of material fact that he was injured in a common work area because the evidence illustrated that "the project site had been occupied for several days at least by only RPA employees." And, the trial court held that "the existence of the stairwell openings in the first and second floors of the house did not create 'a high degree of risk to a significant number of workers . . . .'" We agree with these conclusions.

Contrary to plaintiff's argument on appeal, the evidence is fairly extensive, as well as conclusive, that the stairwell did not create a high degree of risk to a significant number of workmen in a common work area. Richard Armstrong, owner of RPA Construction, testified that no other tradesmen were on the second floor during the roughing in process and that was typical because "usually no other trades are on the site." Timothy Hadley, plaintiff's coworker, testified that no other tradesmen were on the second floor during the roughing in process because there would be no reason to be there. Thomas Hart, also plaintiff's coworker, testified that he did not recall if other tradesmen were at the site. Darren Magalski, plaintiff's foreman on the day of the incident, testified that no other tradesmen were on the second floor and, in fact, had never been on the second floor because the floor had just been sheeted a couple of hours before plaintiff fell. He also testified that, normally, other trades do not go to the job site until all the roughing is completed. Plaintiff even testified that he did not recall other tradesmen on the job site.

We also consider and reject plaintiff's argument that a work progress record showed that another subcontractor was on the job site the day after his fall. Assuming arguendo that such a fact could support a finding that the stairwell was in a common work area, the evidence, including testimony from Joel Finnell, indicated that the stairwell had been covered and barricaded by that time; hence, it could not have created a high degree of risk. Accordingly,

[5] Reversed on other grounds *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

plaintiff failed to support his claim under the common work area doctrine and Delcor Homes-HVA's motion for summary disposition of this claim was properly granted.

Finally, plaintiff argues that Michigan Wall Panel was not entitled to summary disposition of plaintiff's claims against it because a genuine issue of material fact existed as to whether it, as well as Delcor Homes-HVA, was a general contractor at the construction site. After review de novo, considering the record evidence in a light most favorable to plaintiff to determine whether a genuine issue of material fact exists, we disagree. See MCR 2.116(C)(10); *Corley*, *supra*; *West*, *supra*.

Even if we assumed without deciding that Michigan Wall Panel was a general contractor on this construction project, plaintiff's claim against it would fail. As discussed above, to avoid the rule that contractors are generally not liable for the negligence of independent contractors and their employees, plaintiff would have to show that the common work area exception applies. See *Funk*, *supra* at 104. And, for the reasons detailed above—the stairwell did not create a high degree of risk to a significant number of workmen in a common work area—plaintiff failed to support his claim under the common work area doctrine. Therefore, the trial court properly granted summary disposition in Michigan Wall Panel's favor.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto